No. 2360

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

THE BEATSON COPPER COMPANY, a Corporation,
Plaintiff in Error,

vs.

JOHN PEDRIN,
Defendant in Error.

Reply Brief of Plaintiff in Error.

R. J. BORYER,
MYRICK & DEERING,
Attorneys for Plaintiff in Error.

Filed this.....day of May, A. D. 1914.

.....Clerk.

By....., Deputy Clerk.

THE JAMES H. BARRY COMPANY
SAN FRANCISCO

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REPLY BRIEF OF PLAINTIFF IN ERROR.

Replying to the defendant in error we wish briefly first to discuss certain of the facts of the case, then the law.

Defendant in error, John Pedrin, was an experienced miner when he started to work for the Beatson Copper Company some time in November, 1912 (R., 39-40). It is conceded that he had been working steadily in and about the "glory hole" for two weeks prior to the night on which he was injured (R., 47). His work was that of a "mucker," that is he was breaking up and shoveling away the rock blasted from the sides of the pit (R., 26). Two men with a machine drill were boring holes at the edge of the pit for the charges of explosive that were to break down its sides

(R., 26). The general work in which the entire gang was employed was the excavation of the pit and removal of ore-bearing rock therefrom. Green, a shift boss, was one of the laborers working with the men and apparently exercising some authority over them. Counsel for defendant in error says at page 4 of his brief: "He was in charge of all the operations on the shift, which included work in other parts of the mine and outside of it." And at page 30 of his brief he says: "He was acting superintendent." These statements, we submit, are utterly unwarranted.

The following testimony of John Schmitt sheds light on this subject:

> "Q. He was just pit boss, was he?
> "A. I don't call him boss and nobody call him boss that is working there.
> "Q. He was an ordinary laborer?
> "A. *Certainly,* worse than laborer—a laborer understands more of the work than this foreman that was there" (R., 114-115).

And at page 116 of the record, Schmitt testifies that he does not know what Green's position was with the company or what authority he possessed. Green was merely shift boss (R., 109) or foreman (R., 27).

Under the work of this group of men the "glory hole" was gradually growing larger. And the place in and about which Pedrin was laboring was, by reason of the work itself, constantly altering its character. As Schmitt testified: This glory hole was constantly

changing by reason of breaking down of the walls from the shooting and blasting at the top (R., 109).

Obviously, under such circumstances, there was an ever present danger that the side wall might cave at some weakened spot, or loosened rocks might roll from above, injuring the men beneath. This was a peril inherent in the very work done.

Defendant in error challenges (p. 4) our statement that it was the duty of plaintiff and his fellows to pry away the loose and overhanging rock, yet admits it later in his brief at page 22. Such, moreover, is the testimony of both Pedrin and Schmitt, as may be seen by reading pages 60 to 63 of our opening brief. We respectfully maintain that the statement of the case made in our opening brief is both accurate and impartial.

Such being the evidence, can it be said that the trial Court gave proper instructions to the jury?

FIRST, TO REPEAT AS TO THE PLACE TO WORK.

We have shown (Opening Brief, pp. 43-60) that to use Labatt's language: "Where the work is of such "a character that, as it progresses, the environment "of the servant must necessarily undergo frequent "changes the master is not bound to protect the ser- "vants engaged in it against the dangers resulting from "those changes. The cases in which this principle is "most usually applied are those involving the various "kind of construction work" (2 Labatt, M. & S.,

§ 588). Defendant in error concedes at page 19 of his brief that this is the correct rule.

Yet the trial Court instructed the jury that "the duty of providing a safe place to work *cannot be shifted*" (Specification IX, R., p. 204). The Judge told the jury that this duty was one that could not be delegated to a subordinate (same specification); although it is not denied by our opponent that the law is, in cases like the one at bar, directly contrary to this charge, viz: in excavating, mining or quarrying, where, by reason of the work done, the place was constantly changing, the duty of keeping the place is that of the servants and not of the master.

And, as if by way of emphasizing the error, the Court in its next instruction (R., pp. 204-5) makes the master responsible for "care *corresponding to the hazards* of the business." This, fairly interpreted, would mean that inasmuch as the conditions of the place of work were constantly changing under the hand of the workman himself the master is required to be ever at the pit-side, guarding his men against possible mishap of their own creating. This is not the law. The jury was never properly advised. And under such instructions it was impossible for the jury to do other than render its verdict for the plaintiff.

The Court did not even leave it to the jury to determine whether under the facts of this case the master was responsible for a danger arising by reason of the excavating and blasting done.

On the contrary he substantially stated that the master must keep the place safe; that this duty was non-delegable; that the degree of care was commensurate with the danger; that whoever was attending to the matter, irrespective of rank, was a vice-principal, since the master could never abate his watchfulness.

Our complaint is of the failure to submit for the decision of the jury the question of liability under instruction, which pointed out the difference between a fixed, constant, finished place in which to work, and the place where the risks were changing as the work which the men were doing progressed. There is nothing in the instruction given which suggested to the jury any difference in the law in the two cases, and plaintiff in error's instruction was refused (R., pp. 214-215).

SECOND, AS TO THE FELLOW-SERVANT FEATURE OF THE CASE.

So, also, the general rule, as pointed out in our opening brief, is that the foreman or shift boss is the fellow-servant of the other members of the working crew with respect to the keeping of the place of work safe from dangers arising in the progress of the work. The negligence of such shift boss would be, as we have shown, the negligence of a fellow-servant, for which the master is not responsible. The evidence fairly construed leaves no question, we believe, as to the posi-

tion of Green. We believe it cannot be disputed that he was simply a fellow servant of Pedrin. However, our opponent contends that an inference may be drawn to the effect that he was a vice-principal, or practically an acting superintendent. This variance of opinion simply emphasizes the seriousness of the error made by the trial Court when he charged the jury in substance that Green was a vice-principal. It left no possibility for the jury to hold otherwise. The Court stated that the duty of keeping the place safe was not to be delegated, and that whoever represented the master in this respect was a vice-principal. Thereby the Court drove the jury to the conclusion that Green was a vice-principal and not a fellow-servant. This, we contend, was serious error, since if Green were a vice-principal at all he was not so by reason of the duty which he was then discharging, but by reason of authority conferred upon him by his master, of the existence of which authority there is no evidence in the record.

The contention made by our opponent at page 19 of the brief, that an unnecessary risk was added, which unnecessary risk is suggested in the assurance given by Green that the place was safe, is a contention made apart from the instructions. Upon this subject, so far as we know, the Court was silent, and whether there be any merit in our opponent's contention in this respect or no it was clear that we were entitled to a proper instruction as to the duty of

keeping the place safe, and a proper instruction as to the law determining whether Green was a vice-principal or fellow-servant. These errors, irrespective of this added element, are sufficient to entitle us to a reversal, but if we are right in our contention that Green was, with respect to the duty of keeping the place safe, a fellow-servant, and not a vice-principal, then it follows from the authorities cited in our opening brief that the master was not responsible for Green's giving an assurance that the place was safe. See cases cited in our opening brief at page 77.

We respectfully submit that the jury was not instructed upon the law applicable to the facts of the case, that the distinction between a permanent and a changing place in which to work was not pointed out but disregarded, that the jury was improperly instructed upon the subject of fellow-servant, in the particulars pointed out, and that the rights of the defendant below, plaintiff here, and the question whether it was liable or not for this injury were not submitted to the jury under instructions which properly defined those rights and its liability.

Respectfully submitted.

R. J. BORYER,
MYRICK & DEERING,
Attorneys for Plaintiff in Error.